ORIGINAL

Supreme Court, U.S.
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No. 99-7504

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

C.A NO. 99-1611
D.C. NO. 98-4223

CHRISTOPHER A. LOPEZ,

Petitioner,

v.

RANDY J. DAVIS, Warden, Federal Prison Camp, Yankton; and FEDERAL BUREAU OF PRISONS,

Respondent.

SUPPLEMENTAL BRIEF OF THE PETITIONER

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8 pp

SUPPLEMENTAL BRIEF OF THE PETITIONER

The Petitioner, Christopher Lopez, by and through his appointed counsel of record, Mark V. Meierhenry, respectfully submits this Supplemental Brief to advise this honorable Court of the continued conflict between the Untied States Circuit Courts of Appeal.

* * * * *

On August 10, 1999, the Eighth Circuit Court of Appeals in *Bellis v. Davis*, 186 F.3d 1092 (8th Cir. 1999) held that the director of the Bureau of Prisons has the authority to categorically deny consideration for eligibility for early release as proscribed by 18 U.S.C. § 3621(e)(2)(B) to an inmate convicted of a nonviolent offense. Since that time, two other circuit courts have reaffirmed their opposition to the Eighth Circuit's and the Bureau of Prisons's (BOP) construction of 18 U.S.C. § 3621(e)(2)(B).

On January 19, 2000, the Tenth Circuit reaffirmed its position in *Ward v. Booker*, 202 F.3d 1249, 1254 (10th Cir. 2000) that the BOP may not categorically deny eligibility for sentence reductions based on sentence enhancement factors when an inmate is convicted of a non-violent offense. The Tenth Circuit specifically noted that the reasoning adopted by the Eleventh Circuit and several district courts was much more compelling than that of the Eighth Circuit. *Id.* at 1257.

Just months earlier, the Eleventh Circuit had rejected the BOP's construction of 18 U.S.C. § 3621(e)(2)(B),

affirming and adopting the decision of the district court in *Kilpatrick v. Houston*, 197 F.3d 1143, 1135 (11th Cir. 1999), *aff'g* 36 F.Supp.2d 1328 (N.D.Fla. 1999).

While the Tenth and Eleventh Circuits solidified their stands condemning the BOP's administration of Congress's early release program for rehabilitated inmates, the Ninth Circuit continues to rule the opposite direction, siding with the Eighth Circuit's decision in *Bellis*.

On February 4, 2000, the Ninth Circuit ruled in *Bowen v. Hood*, 202 F.3d 1211 (9th Cir. 2000) that the BOP was properly exercising its discretion in denying early release to inmates under similar circumstances to those present in *Bellis*.

As the Court will note, the circuits continue to disagree as to the BOP's authority regarding this issue, and there is no indication that the circuits will ever reconcile their positions. It is not as if one circuit is disagreeing with the vast majority of the other circuits on this issue. In fact, it is a 6-4 split between the circuits.

Ten circuit courts of appeals have had the opportunity to consider the validity of the BOP's categorically denying eligibility for early release to an inmate convicted of a nonviolent offense under 18 U.S.C. § 3621(e)(2)(B). Six of the ten circuits have ruled that the denial of eligibility is a proper exercise of the BOP's discretion.

The circuits that have sided with the BOP are:

Second: *Lasorsa v. Menifee*, 182 F.3d 900 (2nd Cir. 1999)(Table, Text in WESTLAW, 1999 WL 459773).

Fourth: *Pelissero v. Thompson*, 170 F.3d 442 (4th Cir. 1997).

Fifth: *Rublee v. Fleming*, 160 F.3d 213 (5th Cir. 1998).

Seventh: *Parsons v. Pitzer*, 149 F.3d 734 (7th Cir. 1998).

Eighth: *Bellis v. Davis*, 186 F.3d 1092 (8th Cir. 1999).

Ninth: *Bowen v. Hood*, 202 F.3d 1211 (9th Cir. 2000).

Four of ten circuits have concluded that the BOP has exceeded its statutory authority and frustrated Congress's intent by categorically denying eligibility for early release to inmates.

The circuits that have ruled that the BOP has exceeded its authority are:

Third: *Roussos v. Menifee*, 122 F.3d 159 (3rd Cir. 1997).

Sixth: *Orr v. Hawk*, 156 F.3d 651 (6th Cir. 1998).

Tenth: *Ward v. Booker*, 202 F.3d 1249, 1254 (10th Cir. 2000).

Eleventh: *Kilpatrick v. Houston*, 197 F.3d 1143, 1135 (11th Cir. 1999), *aff'g* 36 F.Supp.2d 1328 (N.D.Fla. 1999).

The circuits are virtually split down the middle. The interests of justice require that this Court reconcile the positions of the circuits with regards to 18 U.S.C. § 3621(e)(2)(B). As the law sits now, a year of an inmate's life is dependent on the circuit in which he was sentenced for his federal crime. If this Court does not decide the

question, inmates will continue to have their liberty determined merely by geography.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that the petition for a writ of certiorari be granted.

Dated this 28th day of March, 2000.

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Sioux Falls, SD 571204-6318
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Supplemental Brief of the Petitioner was served by depositing the same in the United States Post Office in Sioux Falls, South Dakota, with first-class postage thereon fully prepaid this 28th day of March, 2000.

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IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

CHRISTOPHER A. LOPEZ, Petitioner, v. RANDY J. DAVIS, Warden, Federal Prison Camp, Yankton; and FEDERAL BUREAU OF PRISONS, Respondent.	NO. 99-7504 C.A NO. 99-1611 D.C. NO. 98-4223 CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Supplemental Brief of the Petitioner was served by depositing the same in the United States Post Office in Sioux Falls, South Dakota, with first-class postage thereon fully prepaid this 28th day of March, 2000.

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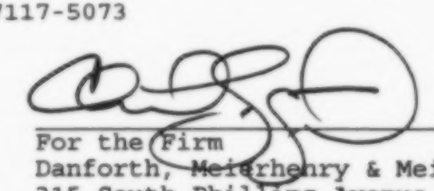

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99-7504

March 28, 2000

Clerk of Court
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543

RE: Christopher Lopez v. United States of America
C.A. No. 99-1611 D.C. No. 98-4223

Dear Clerk:

Enclosed for filing with regard to the above-entitled matter is a Supplemental Brief of the Petitioner. By copy of this letter, I am serving the Solicitor General and the United States Attorney.

Best regards,

Mark V. Meierhenry

MM/do

Enclosure

c: Solicitor General
Ted McBride/Craig Gaumer
Christopher Lopez

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JOINT

APPENDIX

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No. 99-7504

In The

Supreme Court of the United States

CHRISTOPHER A. LOPEZ,

Petitioner,

v.

RANDY J. DAVIS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed December 15, 1999
Certiorari Granted April 24, 2000

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United States Court of Appeals
for the Eighth Circuit

Relevant Docket Entries Case No. 99-1611

3/12/99 Prisoner Case Docketed Dist. Ct. Office; Sioux Falls, SD

* * *

8/10/99 THE COURT: James B. Loken, David R. Hansen, Morris S. Arnold. OPINION FILED by Morris S. Arnold PUBLISHED

8/10/99 JUDGMENT: James B. Loken, David R. Hansen, Morris S. Arnold: The judgment of the lower court is REVERSED and REMANDED in accordance with the opinion.

8/24/99 PETITION for REHEARING with Petition for Rehearing En Banc.

* * *

9/16/99 JUDGE ORDER: Denying Petition for Rehearing with Petition for Rehearing En Banc

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P3 5330.10
CN-03 October 09, 1997
Attachment N, Page 1

(NOTIFICATION OF INSTANT OFFENSE DETERMINATION)

DATE: 12-17-98

REPLY TO: Jeanne [Illegible] (DAPC's Name)

TO: Frank [Illegible] (Unit Manager's Name)

SUBJECT: Lopez, Christopher (Inmate's Name)

05102-030 (Reg. No.)

PART 1 – INSTANT OFFENSE DETERMINATION

Instructions: Please mark an "X" in either response I or response II, and then go to Part 2 on the back.

X I. The inmate's instant offense is a crime that excludes him or her from early release under 18 U.S.C. § 3621(e). (If response I requires an "X" in either item A or B).

— A. Crime of Violence as contained in the Categorization of Offenses Program Statement.

X B. Crime listed under the Director's Discretion as contained in the Categorization of Offenses Program Statement.

— II. The inmate's instant offense is not a crime that excludes him or her from, early release under 18 U.S.C. § 3621(e).

SEE PART 2 ON BACK

PART 2. OTHER CRITERIA

Instructions: (Please mark an "X" in front of each true statement).

X 1. Inmate is not an INS Detainee.

X 2. Inmate is not a Pretrial Inmate.

X 3. Inmate is not a Contractual Boarder.

X 4. Inmate is not an "old law" inmate.

Explanation or other pertinent Information (e.g. inmate is both old law and new law)

_____

_____

_____

After Parts 1 and 2 are completed, sign and date the form, and return it to the DAPC as soon as possible.

Unit Manager (or designee) /s/ Illegible for

Date of Review
12-17-98

_____

NOTICE OF RESIDENTIAL DRUG ABUSE PROGRAM QUALIFICATION AND PROVISIONAL § 3621(e) ELIGIBILITY

TO: Christopher Lopez

FROM: Jeanne Morck /s/ J Morck

TITLE: **DAP Unit Administrator**

REG NO: 05102-030

INSTITUTION: FPC Yankton

DATE: 12-21-1998

SECTION 1 – RESIDENTIAL DRUG ABUSE PROGRAM QUALIFICATION

YOU HAVE REQUESTED PARTICIPATION IN THE BUREAU'S RESIDENTIAL DRUG ABUSE TREATMENT PROGRAM. MY REVIEW OF YOUR CASE INDICATES THAT YOU **DO*/DO NOT MEET THE ADMISSION'S CRITERIA FOR THE RESIDENTIAL DRUG ABUSE PROGRAM. IT APPEARS THAT YOU DO/DO NOT QUALIFY TO PARTICIPATE IN THE RESIDENTIAL PROGRAM. (IF THE INMATE IS FOUND TO NOT QUALIFY, STATE THE REASON(S) BELOW).

_____

* Underlined italic words were circled in original.

Comments:

PS 5330.10
CN-03 10/9/97
Attachment J, Page 2

SECTION 2 – PROVISIONAL § 3621(E) ELIGIBILITY – TO BE COMPLETED ONLY IF THE INMATE HAS COMPLETED OR QUALIFIES FOR THE RESIDENTIAL DRUG ABUSE TREATMENT PROGRAM.

FOR RESIDENTIAL DRUG ABUSE TREATMENT PROGRAM GRADUATES TO BE ELIGIBLE FOR EARLY RELEASE, THEY MUST (DAPC must initial):

VF NOT BE AN INS DETAINEE.

VF NOT BE A PRE-TRIAL INMATE.

VF NOT BE A CONTRACTUAL BOARDER.

VF NOT BE AN "OLD LAW" INMATE.

~~VF~~ NOT HAVE A CURRENT CRIME THAT IS AN EXCLUDING OFFENSE IN BOP CATEGORIZATION OF OFFENSES POLICY (Mark an 'X' in the appropriate block below).

X NOT A CRIME OF VIOLENCE AS CONTAINED IN BOP CATEGORIZATION OF OFFENSES POLICY.

_ NOT AN EXCLUDING CRIME BY THE DIRECTOR'S DISCRETION IN CATEGORIZATION OF OFFENSES POLICY

X NOT HAVE ANY PRIOR FELONY OR MISDEMEANOR ADULT CONVICTION FOR HOMICIDE, FORCIBLE RAPE, ROBBERY, AGGRAVATED ASSAULT, OR SEXUAL ABUSE OF CHILDREN.

X UNDERSTAND THAT NEARING THE TIME OF YOUR RELEASE, THE WARDEN WILL DETERMINE IF YOU ARE ELIGIBLE FOR TRANSFER TO A COMMUNITY-BASED PROGRAM. IF YOU ARE NOT ELIGIBLE, YOU CANNOT COMPLETE THE COMMUNITY TRANSITIONAL SERVICES PORTION OF THE DRUG PROGRAM, AND THEREFORE, YOU MAY NOT RECEIVE A § 3621 (e) RELEASE.

MY CURRENT ASSESSMENT, IN CONSULTATION WITH YOUR UNIT TEAM, IS THAT IT DOES / *DOES NOT* APPEAR THAT YOU ARE PROVISIONALLY ELIGIBLE FOR AN EARLY RELEASE. IF NOT, LIST **ALL** THE REASON(S):

Comments: Director's Discretion

IF APPLICABLE, I UNDERSTAND THAT A DETERMINATION OF EARLY RELEASE FOR ME IS ALWAYS PROVISIONAL, *AND MAY CHANGE*.

INMATE'S SIGNATURE /s/ C Lopez

(indicate if refused to sign)

cc: Drug Abuse Treatment File
Unit Team (place in section 4 of inmate central file)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

***

> custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. § 3621 (e)(2)(B).

To interpret the statute, the BOP issued regulations in May 1995 defining "nonviolent offense" as the converse of crime of violence. 28 C.F.R. § 550.58 (1995). This 1995 regulation excluded from eligibility for early release under § 3621 (e)(2)(B) those inmates whose "current offense is determined to be a crime of violence as defined in 18 U.S.C. § 924 (c)(3)." 28 C.F.R. § 550.58 (1995).[2] Section 924 (c)(3) defines a crime of violence as an offense that is a felony and that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another or "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

To implement this regulation, the BOP adopted Program Statement 5162.02, *Definition of Term, "Crimes of Violence"* (July 24, 1995). At paragraph 5, this program statement set out the statutory definition of "crime of

---

[2] An inmate who completes a residential drug abuse treatment program during his or her current commitment may be eligible for early release by a period not to exceed 12 months, in accordance with paragraph (a) of this section, . . . unless the inmate's current offense is determined to be a crime of violence as denied in 18 U.S.C. § 924(c)(3), or unless the inmate has a prior felony and/or state conviction for homicide, forcible rape, robbery or aggravated assault. 28 C.F.R. § 550.58 (1995).

violence" found in 18 U.S.C. § 924 (c)(3). At paragraph 9, the program statement states in part:

> Convictions for an offense listed below, [including possession of a listed chemical], . . . may or may not meet the crime of violence definition by involving the use, attempted use, or threatened use of force, or by presenting a substantial risk that force might be used against the person or property of another. At the time of sentencing, the court makes a finding if the offense involved violence, and this finding is reflected in the Presentence Investigation Report section entitled "Offense Computation," under the subsection entitled "Specific Offender Characteristics." This subsection references a particular United States Sentencing Guideline that provides for an increase in the Total Offense Level if the criminal violation was committed with force.

Under this program statement, where an inmate was assessed two levels to his offense level for possession of a firearm under the Federal Sentencing Guidelines he was automatically classified as ineligible for early release, and his crime was regarded by the BOP as a crime of violence.

In *Martin v. Gerlinski*, 133 F.3d 1076 (8th Cir. 1998), the Eighth Circuit ruled that the BOP exceeded its authority by considering the firearm enhancement in determining a prisoner's eligibility for early release under 18 U.S.C. § 3621 (e)(2)(B). *Id.* at 1080-81. The court stated:

> [T]he operative word in 3621 (e)(2)(B) is 'convicted,' thus requiring the BOP to look to the offense of conviction itself to determine whether it meets the definition of a 'nonviolent offense'; § 3621 does not address sentencing or sentencing enhancement factors.

Id. at 1079. The *Martin* court went on the say, "[a]lthough we agree that the BOP has discretion to determine which offenses will be eligible for consideration, we cannot agree that the BOP may disregard the plain language of the statute which speaks only to those 'convicted' of a nonviolent offense." *Id.* at 1080.

In so holding, the *Martin* court rejected the reasoning of *Venegas v. Henman*, 126 F.3d 760, 763-65 (5th Cir. 1997), wherein the Fifth Circuit addressed whether the BOP had properly classified inmates convicted under 18 U.S.C. § 922 (g) (felon in possession of a firearm) and 21 U.S.C. § 841 (b)(1) (drug possession with intent to distribute) as ineligible for consideration for early release under § 3621 (e)(2)(B). The Fifth Circuit held that "[t]he Bureau did not exceed its statutory authority by using its discretion to exclude from consideration for early release those prisoners convicted of possession of a weapon by a felon and offenses enhanced under the sentencing guidelines for possession of a weapon." *Id.* at 763. The *Venegas* court concluded that the operative words within section 3621 (e)(2)(B) are "may be reduced by the Bureau of Prisons," whereas the Eighth Circuit found that the statute requires the BOP to focus on the offense of conviction to establish eligibility for consideration for early release. *Martin* at 1080.

Prior to the Eighth Circuit's decision in *Martin*, on October 9, 1997, the BOP implemented the current regulations and program statement defining eligibility for the RDAP and early release. The regulatory section, 28 C.F.R. § 550.58, *Considerations for Early Release*, was amended to delete the reference to § 924(c)(3) and its definition of

crimes of violence. The amended regulation states, in part:

> As an exercise of the discretion vested in the Director of the Federal Bureau of prisons, the following categories of inmates are not eligible for early release: . . .
> (vi) Inmates whose current offense is a felony:
> (A) that has an element, the actual, attempted, or threatened use of physical force against the person or property of another, or
> (B) that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or
> (C) that by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or
> (D) that by its nature or conduct involves sexual abuse offenses committed upon children.

28 C.F.R. § 550.58.

Also on October 9, 1997, the BOP program statements were amended to reflect this change. A specific program statement called "Categorization of Offenses," Program Statement 5162.04, was added. Section seven lists the offenses that, in the Director's discretion, shall preclude an inmate from receiving certain BOP program benefits.[3]

---

[3] Section 7 states in relevant part:

OFFENSES THAT AT THE DIRECTOR'S DISCRETION SHALL PRECLUDE AN INMATE'S RECEIVING CERTAIN BUREAU PROGRAM BENEFITS. For certain Bureau programs, such as early release pursuant to 18 U.S.C. § 3621 (e) and placement in Intensive Confinement Centers, an inmate may be denied program benefits if he or she was convicted of an offense listed

The list in section seven is the same as the above-quoted section of 28 C.F.R. § 550.58, *Considerations for Early*

---

in either this section or section 6. If an inmate is denied the benefit of such a program, staff must carefully describe the basis for the denial. For example, if an inmate is convicted of an offense listed in this section, the inmate shall be denied a program benefit because he or she committed an offense identified at the Director's discretion, rather than a crime of violence.

As an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under the provisions described below shall be precluded from receiving certain Bureau program benefits.

Inmates whose current offense is a felony that:

- has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or
- involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or
- by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or
- by its nature or conduct involves sexual abuse offenses committed upon children.

Thus, for an inmate to receive Bureau program benefits such as those mentioned above, he or she must not be convicted of an offense listed in this section or in Section 6.

. . .

b. Criminal Offense with a Specific Offense Characteristic Enhancement.

. . .

At the time of sentencing, the court makes a finding of whether the offense involved the use or threatened use of force,

Release. This new program statement is applied to inmates either not participating in the RDAP as of October 9, 1997 or those who had not completed the RDAP by October 9, 1997. Like the previous program statement, the new one

---

and this finding is reflected in the PSI section entitled "Offense Computation," subsection entitled "Specific Offense Characteristics." This subsection references a particular U.S. Sentencing Guideline that provides for an increase in the Total Offense Level if the criminal violation was committed with force.

Example: Section 841 of Title 21, United States code makes it a crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11), the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic" (for example, if a dangerous weapon was possessed during commission of the offense), the court would increase the defendant's base offense level by two levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a serious potential risk that force may be used against persons or property. Specifically, as noted in the U.S. Sentencing Guidelines § 2D1.1., application note 3, the enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. Accordingly, an inmate who was convicted of manufacturing drugs, (21 U.S.C. § 841) and received a two-level enhancement for possession of a firearm has been convicted of an offense that will preclude the inmate from receiving certain Bureau program benefits.

. . .

e. Special Circumstances

- *Title 18, United States Code § 922(g).* All offenses under 18 U.S.C. § 922(g) shall preclude an inmate from receiving certain Bureau program benefits.

categorically excludes inmates from eligibility for consideration based upon the assessment of a two point enhancement for weapon possession under the Federal Sentencing Guidelines.

Thus far, three Circuits have evaluated whether the BOP acted within its statutory authority in implementing the October 1997 regulation changes. The Sixth Circuit held that even though the BOP has eliminated the regulation's reliance on the meaning of "crime of violence" in § 924(c), under the new rule, the BOP continues to deny eligibility to those prisoners who have been convicted of nonviolent offenses in violation of § 3621(e)(2)(B). *Orr v. Hawk*, 156 F.3d 651 (6th Cir. 1998). The court stated that "if the BOP cannot deny eligibility for consideration for early release to anyone who has committed a nonviolent offense, it can deny eligibility only to those who have committed a crime of violence." *Id.* at 655. Further, "the BOP cannot reasonably refuse to consider those convicted as felons in possession for early release under 3621(e)(2)(B)." *Id.* at 656. The other appellate courts that have considered this issue are the Fourth Circuit in *Pelissero v. Thompson*, 155 F.3d 470 (4th Cir. 1998) and the Seventh Circuit in *Bush v. Pitzer*, 133 F.3d 455 (7th Cir. 1997). Both the *Pelissero* and *Bush* courts, like the *Venegas* court, focused on the discretion afforded the BOP rather than on the elements of the offense of conviction as required by the *Martin* court. For example, in *Pelissero* the court stated:

> Congress entrusted the decision whether to grant inmates early release under 18 U.S.C. § 3621(e)(2)(B) "solely to the discretion and expertise of the BOP, with a cautions eye toward the public safety and welfare" *Pelissero*, 955 F. Supp. at 637. In exercising this discretion, the Bureau of Prisons must balance Congress's twin goals of providing an incentive for drug-addicted prisoners to undergo treatment while at the same time protecting the public from potentially violent criminals. We think that the 1997 revised version of 28 C.F.R. § 550.58 constitutes a reasonable interpretation designed to effect this objective.

Id. at 476-77 (citing *Bush* at 458 (upholding 1997 revised regulation on grounds that Bureau of Prisons may rationally deny early release to prisoners whose underlying conduct is violate or prone to violence)).

While it is true that the BOP may exercise a great deal of discretion in determining who among the eligible nonviolent offenders may be released, the BOP may not, in the first instance, exclude those convicted of nonviolent offenses from early release consideration.[4] Consistent with the Eighth Circuit's opinion in *Martin* and the Sixth Circuit's decision in *Orr*, it is the holding of this Court that the BOP has exceeded its authority by interpreting 18 U.S.C. § 3621 (e)(2)(B) in a manner inconsistent with the plain language of the statute. The 1997 revised program

---

[4] As stated by the Eighth Circuit in *Martin*, the Court has jurisdiction to review whether the BOP exceeded its statutory authority although the Court may not review the BOP's discretionary decision to deny a sentencing reduction. *Id.* at 1079 (citing *Wajda v. United States*, 64 F.3d 385, 388 (8th Cir. 1995) (court retains jurisdiction to determine whether Parole Commission exceeded statutory authority notwithstanding lack of jurisdiction to review substantive decision)).

statement does not correct the problems the Eighth Circuit found in the 1995 version because the BOP continues to rely upon factors other than whether the crime of conviction was nonviolent in making the initial determination as to whether a prisoner is eligible to be considered for early release under section 3621 (e)(2)(B). Both the former and revised program statements allow the BOP to categorically exclude inmates from consideration based upon sentencing factors or weapon possession, without regard to whether the underlying conviction was nonviolent.

At least two other district courts have held similarly. *See Hicks v. Brooks*, ___F. Supp.2d___, 1998 WL 817828 (D.Colo.); *Gavis v. Crabtree*, ___F. Supp.2d___, 1998 WL 842934 (D. Or.). In *Hicks*, the court explained:

> [i]n effect, the BOP has eliminated the definition of crime of violence from the 1997 revised regulation and incorporated into the revised regulation the language of the sentence enhancement for possession of a firearm, language that previously was in Program Statement 5162.02. By doing so, the BOP again has accomplished precisely what [the Tenth Circuit] said it may not, i.e., exclude categorically from consideration for early release upon completion of a drug treatment program those inmates convicted of a nonviolent offense who [sic] sentence was enhanced for possession of a weapon and, once again, convert a conviction for a nonviolent offense into a violent one by considering the sentence enhancement.

Id. at *5.

Although 18 U.S.C. § 3621 (e)(2)(B) does allow the BOP to exercise discretion to determine who, among the statutorily eligible inmates, should be granted early release, it cannot exercise its discretion to deny recognition of eligibility to those inmates statutorily eligible for consideration. In the first instance, under the language of § 3621 (e)(2)(B), *Martin*, and *Orr*, inmates convicted of nonviolent offenses must be deemed eligible for consideration for a sentence reduction. The exercise of discretion requires a careful consideration of each individual case. A categorical denial of all cases within one general group without individiaul examination is no exercise of discretion at all.

Conclusion

Based upon the foregoing analysis, the Court grants the petition and orders the BOP to reconsider Lopez's eligibility for early release in accordance with this opinion. Accordingly,

IT IS ORDERED

(1) that the petition filed by Christopher A. Lopez is granted.

(2) that the BOP will reconsider the eligibility of Christopher A. Lopez for early release under 18 U.S.C. § 3621(e)(2)(B) in accordance with this opinion.

Dated this 6th day of January, 1999.

BY THE COURT:

/s/ Lawrence L. Piersol
Lawrence L. Piersol
Chief Judge

ATTEST:

JOSEPH HAAS, CLERK
BY: /s/ Sharon Louro
(SEAL) DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

***

ATTEST:
JOSEPH HAAS, CLERK

BY: /s/ Sharon Louro
(SEAL) DEPUTY

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 99-1203/1204/1205/1206/1207/1211/1212/1213/1214/1611

Calvern J. Bellis, Shon Pierson, Brian T. Shields, David J. Miller, Thane Martin, George Cook, Ryan Scott Clark, Sean A. Winston, Tim Walker, and Christopher A. Lopez,	*	
Appellees,	*	Appeals from the United States District Court for the District of South Dakota.
v.	*	
Randy J. Davis, Warden, Federal Prison Camp, Yankton, South Dakota; and Federal Bureau of Prisons,	*	
Appellants.	*	

Submitted: May 12, 1999

Filed: August 10, 1999

Before LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD; Circuit Judge.

In these consolidated appeals, ten federal prisoners petitioned for a writ of habeas corpus, *see* 28 U.S.C. § 2241(a), against the U.S. Bureau of Prisons (BOP) and Warden Randy Davis of the Federal Prison Camp in

Yankton, South Dakota. Each of the appellees has completed or is scheduled to complete the BOP's voluntary residential drug abuse treatment program, *see* 18 U.S.C. § 3621(b). The statute, *see* 18 U.S.C. § 3621(e)(2), authorizes the BOP to offer an early-release incentive to certain federal prisoners in order to encourage them to enroll in its voluntary drug abuse treatment program. The statute also provides that "[t]he period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve," *see* 18 U.S.C. § 3621(e)(2)(B).

To implement the statute, the BOP promulgated regulations and a program statement which together define inmates' eligibility for the early-release incentive. *See* 28 C.F.R. § 550.58 and Federal Bureau of Prisons Program Statement 5162.04, (categorization of offenses) (Oct. 9, 1997). The regulations and the program statement identify two groups of offenses. The first consists of various federal offenses that the director of the BOP has determined to be "crimes of violence"; inmates convicted of these offenses are, by the terms of the statute, excluded from eligibility for the early-release incentive. *See* Federal Bureau of Prisons Program Statement 5162.04, §§ 1-2, §§ 5-6, § 9. The second is a group of crimes (called "director's discretion offenses") a conviction for which renders an inmate ineligible for the early-release incentive. *See* 28 C.F.R. § 550.58(a)(1)(iv), § 550.58(a)(1)(vi)(A), § 550.58(a)(1)(vi)(B), § 550.58(a)(1)(vi)(C), and Federal Bureau of Prisons Program Statement 5162.04, §§ 1-2, § 5,

§ 7, § 9. It is this second group of offenses that is at issue in this appeal.

The regulations pertaining to "director's discretion offenses" state, *inter alia*, that inmates convicted of "a felony . . . [t]hat involved the carrying, possession, or use of a firearm or other dangerous weapon" are not eligible for early release. *See* 28 C.F.R. § 550.58(a)(1)(vi)(B). Section 7 of the program statement identifies more particularly the offenses that the director of the BOP has decided will preclude eligibility for early release. Relying on the regulations and the program statement, the BOP determined that the appellees were ineligible for the early-release incentive, either because they had been convicted of being a felon in possession of a firearm, or because they had received a sentencing enhancement under the federal sentencing guidelines for possession of a dangerous weapon during the commission of a federal drug offense.

In their petitions to the district court, the appellees contended that the BOP exceeded its statutory authority by categorically excluding inmates who were not convicted of violent offenses from eligibility for the early-release incentive. The district court granted the appellees' petitions, and the BOP and the warden appeal. We disagree.

We have previously recognized that 18 U.S.C. § 3621(e)(2) vests broad discretion in the BOP to determine which individuals, among the group of statutorily eligible inmates convicted of nonviolent offenses, are appropriate candidates for early release. *See Love v. Tippy*, 133 F.3d 1066, 1069 (8th Cir. 1998), *cert. denied*, 118 S. Ct.

2376 (1998). The statute states only that the prison term of an inmate convicted of a nonviolent offense "*may* be reduced by the Bureau of Prisons" (emphasis added), *see* 18 U.S.C. § 3621(e)(2)(B). The language is discretionary and does not mandate that the BOP grant a sentence reduction to any particular inmate or class of inmates. *Cf. Morgan v. Rabun*, 128 F.3d 694, 699 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1809 (1998) (finding "may" language in state statute discretionary). Under the plain language of this statute, "[c]ommission of a 'nonviolent offense' makes a prisoner eligible for consideration but does not . . . grant the boon he seeks. Eligibility is not entitlement." *Bush v. Pitzer*, 133 F.3d 455, 457 (7th Cir. 1997).

Nor does the statute mandate that the BOP exercise its discretion by making individual, rather than categorical, assessments of eligibility for inmates convicted of nonviolent offenses. In fact, Congress expected the BOP to make early-release determinations "based on criteria to be established and uniformly applied," H.R. Rep. No. 103-320 (section-by-section analysis), 1993 WL 537335 (Nov. 3, 1993). It is well settled, moreover, that where Congress has left a gap in a statute for an agency to fill, we defer to the agency's interpretation so long as it is a permissible construction of the statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45, 866 (1984); *see also Love*, 133 F.3d at 1069.

The BOP chose to exercise the discretion granted to it under the statute by identifying additional categories of inmates who are ineligible for the early-release program because, although their offenses may be "nonviolent" within the meaning of the statute, their underlying conduct indicates that they pose a serious risk to public

safety. We think that the BOP's decision to exclude these additional categories of inmates from eligibility represents a manifestly permissible construction of the statute and an appropriate exercise of the BOP's discretion.

The appellees contend that the BOP's current regulations and the program statement interpreting the relevant statutory language are contrary to our decision in *Martin v. Gerlinski*, 133 F.3d 1076 (8th Cir. 1998). We disagree. In *Martin*, 133 F.3d at 1078, we examined the portion of the statute that limits eligibility for early release to nonviolent offenders, *see* 18 U.S.C. § 3621(e)(2)(B). In striking down an earlier set of regulations that attempted to interpret the statutory term "nonviolent offense," we held that the BOP must look to the offense of conviction, not to sentencing factors, in determining whether an offender was convicted of a "nonviolent offense" and thus eligible under the statute for the early-release incentive. *Martin*, 133 F.3d at 1079-81. We did not, however, address the question at issue in this appeal, namely, whether the BOP may, as an exercise of its discretion, *see* 28 C.F.R. § 550.58(a)(1), look to sentencing factors in deciding which individuals among statutorily eligible inmates are appropriate candidates for early release. *Martin* is therefore of no relevance to the present case.

We conclude that the BOP acted within its authority in excluding the appellees from the early-release program under 18 U.S.C. § 3621(e)(2). We therefore reverse the district court's grant of the appellees' petitions, and

remand with instructions to enter judgment consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1203/1204/1205/1206/1207/
1211/1212/1213/1214/1611SDSF

Calvin Bellis, et al., Appellees, v. Rand[y] J. Davis, et al., Appellants.	•	Appeal from the United States District Court for the District of South Dakota

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 16, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 24, 2000

Mr. Mark V. Meierhenry
315 S. Phillips Avenue
Sioux Falls, SD 57104

Re: Christopher A. Lopez
v. Randy J. Davis, Warden, et al.
No. 99-7504

Dear Mr. Meierhenry:

The Court today entered the following order in the above entitled case:

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted.

Sincerely,

William K. Suter, Clerk